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State responsibility

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

Italy

[4 May 1998]

General remarks

Italy wishes first of all to commend the members of the International Law Commission, particularly those who have acted as special rapporteurs, for their excellent work on the draft articles on State responsibility. The draft articles adopted by the Commission on first reading would appear already to represent a very good basis for discussion at an international conference to adopt an international convention on the subject.

Italy's observations concern the following points:

- The scope of the draft;
- The issue of whether damage is an element of an internationally wrongful act;
- The issue of the distinction between international crimes and international delicts.

Italy reserves the right to submit specific comments on parts two and three of the draft at a later date.

In the Italian Government's view, the draft articles should cover determination of the conditions to be met for an internationally wrongful act committed by a State to exist, the legal consequences of such an act and the settlement of disputes concerning such acts.

Part One
Origin of international responsibility

Chapter I. General principles

Article 3. Elements of an internationally wrongful act of a State

In the Italian Government's view, damage should not be included among the elements of an internationally wrongful act.

Under international law, the breach of a legal obligation by a State necessarily involves the injury of a corresponding subjective right of another subject (or several other subjects) of international law. This other subject does not have to demonstrate that it has in addition suffered material or moral damage in order to be able to assert that an internationally wrongful act has been committed against it and that the wrongdoing State bears responsibility for that wrongful act. The injury of its subjective right suffices. Naturally, the content of the wrongdoing State's responsibility will be the same only where there has been material or moral damage.

Affirming that a wrongful act exists and that there is State responsibility only if the breach of the obligation attributable to the State has caused damage to another subject would be tantamount to saying, for example, that the violation by a State of another State's

territory, or the adoption by a State of legislation that it had undertaken not to adopt, do not represent wrongful acts if they do not cause material or moral damage. What is more, in the case of obligations concerning the way in which States must treat their citizens, the State that breaches such obligations would not be committing an internationally wrongful act because there would be no State (or other subject of international law) that has suffered material or moral damage.

In fact, even those – ever fewer in number – who assert that damage is a condition for the existence of an internationally wrongful act do not draw such a conclusion. They affirm that damage has occurred in the cases in question, and they speak of legal damage in that connection. However, as the Commission indicated in its commentary to draft article 3, there is no point in referring to damage as being a subsequent element of a wrongful act, which would follow a breach of an obligation, since any breach of an international obligation involves legal damage and such damage is sufficient to establish the existence of a wrongful act and the responsibility of the wrongdoing State.

Those who now insist that damage should be included as an element of an internationally wrongful act are actually motivated by a different concern, i.e. the concern that failure to mention damage as an element of an internationally wrongful act would, where there is a breach of a given obligation, allow any member of the international community to invoke the existence of a wrongful act and the responsibility of the wrongdoing State. This concern is not well founded, however. The fact that damage is not regarded as an element of a wrongful act does not mean that all States may invoke the responsibility of the wrongdoing State. Only the State or States whose subjective right has been injured may do so, i.e. those in respect of which an obligation has been breached. What is at issue, therefore, is identifying the injured State, a subject that is dealt with in draft article 40. Unquestionably, in the case of the breach by a State of an obligation under a bilateral treaty, only the other State party to the treaty will have an injured subjective right and consequently only that State will be able to invoke the responsibility of the wrongdoing State. In the case of the breach of obligations under customary international law or under a multilateral treaty, identification of the injured subject is more complex, but it is clear that the breach of most obligations does not entail the injury of the subjective rights of all the States addressed by the norm containing the obligation (i.e., in the case of customary international law, all members of the international community and, in the case of a multilateral treaty, all States parties to the treaty). Only in instances where there are norms laying down *erga omnes* obligations (or *erga omnes* participants) will all States (or all States parties to the treaty) be able to claim that a subjective right has been injured and consequently invoke the responsibility of the wrongdoing State. It is therefore necessary to establish whether such norms exist – a matter dealt with in draft article 40 – and, if so, what the norms in question are; the issue is not whether damage is a prerequisite for the existence of an internationally wrongful act. Furthermore, if the concept of damage is regarded as including legal damage, asserting that damage is an element of a wrongful act is insufficient to preclude the existence of obligations whose breach gives rise to responsibility with respect to all States. In fact, in the case of the breach of what are referred to as *erga omnes* obligations, all States addressed by the norm should be regarded as having had a subjective right injured and, consequently, as having suffered legal damage.

Chapter III. Breach of an international obligation

Article 19. International crimes and international delicts

Italy already indicated during the discussions in the Sixth Committee that it endorsed the choice made by the International Law Commission to distinguish, within the category of internationally wrongful acts of States, a category of more serious wrongful acts which it terms "international crimes", entailing a different (or partially different) responsibility regime from the one attaching to all other wrongful acts (which it terms "international delicts"). Italy is aware that the distinction made by the Commission in article 19 of the draft has raised objections on the part of many States. Nevertheless, Italy is still of the opinion that this distinction should be made.

In Italy's view, existing international law affords to certain basic interests of the international community a protection different from that afforded to other interests. This different protection, which is apparent, for example, in the regime governing causes of invalidity or termination of treaties (conflict with a *jus cogens* rule) and the one on individual responsibility of persons acting in an official capacity (punishability of persons acting in an official capacity who have committed war crimes, crimes against peace or crimes against humanity), is also apparent in the State responsibility regime.

Existing customary law already provides that the violation of certain obligations which protect the fundamental interests of the international community simultaneously infringes the subjective rights of all States and authorizes all of them to invoke the responsibility of the State which violated the obligation: these are what the International Court of Justice has termed "*erga omnes* obligations". The prohibition against armed aggression is the most important example of this category of obligations; it is not only the State which is the direct victim of the aggression that is injured: all States are injured, and can invoke the responsibility of the State committing the aggression. This is not true of the vast majority of obligations laid down by the rules of international law, including those laid down by customary rules.

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The formula used by the Commission in article 19 of the draft to designate the wrongful acts included in the category of international crimes was criticized by many States. In Italy's view, however, even if the formula may appear somewhat complicated, it has a number of positive aspects.

The first positive aspect of this formula is that it does not give rise to a "crystallization" of international crimes. To this end, instead of drawing up a precise list of the wrongful acts that were to be regarded as international crimes at the time when the draft was prepared, the Commission preferred to indicate the criteria which should guide the interpreter in determining the wrongful acts to be characterized as international crimes at a given moment. Italy understands the reasons which led the Commission to use as its basic criterion the criterion adopted in the Vienna Convention on the Law of Treaties for designating rules as belonging to *jus cogens*, namely, a "*renvoi*" to the international community as a whole. The Commission specified, in its commentary to article 19, that it had meant thereby to indicate that a given wrongful act must be regarded as a wrongful act entailing special legal consequences not only by one or another group of States (even a majority group), but by all the basic components of the international community. To envisage the same method for designating the two categories of rules (rules which cannot be derogated from by special agreement and rules establishing obligations whose violation

represents an international crime) is an acceptable solution, but as what is involved is an even trickier matter than *jus cogens*, subsequent clarifications are needed to determine what international crimes are. The Commission has chosen the route of providing examples that can serve as a guide for the interpreter who would be responsible for determining whether, at a given moment, a wrongful act is considered to be an international crime by the international community as a whole. The list of categories of wrongful acts which could, in accordance with article 19, include international crimes is, in Italy's view, still valid nowadays, even though over 20 years have elapsed since the adoption of that article.

These are the positive aspects of the formula adopted. Nevertheless, the decision not to draw up a full list of international crimes makes it all the more necessary that the determination of whether an international crime has been committed in a specific case should be entrusted to an impartial third party, as the former Special Rapporteur had proposed. The Italian Government reserves the right to submit comments on this subject in dealing with the articles in parts two and three.

Part Two
Content, forms and degrees of international responsibility

Chapter I. General principles

Article 40. Meaning of injured State

See article 3.

Chapter III. Countermeasures

With respect to the *legal consequences of an internationally wrongful act committed by a State*, Italy considers it of the greatest importance that the draft should deal not only with what are referred to as "substantive" consequences, i.e. new obligations for a wrongdoing State, but also *countermeasures* that may be taken against such a State, and the conditions relating to resort to countermeasures.

Notwithstanding the theoretical reasons stated by the Commission in the commentary to draft article 1, which prompt Italy to opt for a broad concept of international responsibility rather than one confined to new obligations for the wrongdoing State, the Italian Government believes that it is of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified. It is particularly important to establish clearly the content of the rules of international law with respect to the consequences of a wrongful act, so as to prevent abuse on the part of States. In a specific case new obligations for a wrongdoing State are determined by agreement by the injured State and the wrongdoing State, or by a third party (an arbitrator, for example), whereas the decision to adopt countermeasures and as to their content is normally taken on the basis of a unilateral decision by the State taking the measures (which, of course, does not mean that the State taking the measures may judge its own case but, rather, that it "takes the risk" of taking countermeasures whose lawfulness could subsequently be challenged). It is therefore most important that the content of the rules of international law concerning countermeasures should be clearly established.

Chapter IV. International crimes

Italy believes that the draft should deal with *the responsibility of States for particularly serious wrongful acts* (referred to as "international crimes" in the draft), and not only responsibility for "ordinary" wrongful acts (referred to as "international delicts" in the draft). For the reasons indicated below, in section III, Italy believes that certain particularly serious wrongful acts already entail legal consequences other than those of wrongful acts in general. Such special consequences should not be determined on the basis of customary law alone. Moreover, it might be advisable to include in the draft provisions to complement and enhance the regime that currently exists under customary law. Italy therefore does not share the view that the legal consequences of the most serious wrongful acts should be excluded from the draft articles on State responsibility.

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Existing customary law provides for certain differences in the content of the legal consequences which injured States can invoke. Thus, for example, in the case of armed aggression, unlike in the case of any other wrongful act, injured States can adopt measures of self-defence entailing the use of force. Other differences begin to emerge in the framework of the reparation owed by the State committing the wrongful act, particularly with regard to the content of satisfaction and guarantees of non-repetition of the wrongful act.

In Italy's view, the differences envisaged in international law in the responsibility regime for wrongful acts which adversely affect the fundamental interests of the international community should appear in the draft. At the same time, these differences should be developed and integrated in the light of the need to make the responses to such acts more effective and to prevent abuse. The trickiest questions concern: (a) the need to find a criterion for ensuring coordination between the individual reactions of injured States, and (b) the need to envisage a system for deciding that such an act has been committed in a specific case. An interesting proposal on that subject had been put forward by the former Special Rapporteur, but it was not adopted by the Commission. Nevertheless, the Commission should continue its work on these questions and submit to States other proposals in this regard, with a view to a possible codification conference in the future.

A failure to deal in the draft articles on State responsibility with the legal consequences arising out of internationally wrongful acts which adversely affect the fundamental interests of the international community can have only two aims: (a) to assert that such acts entail the same responsibility regime as any other wrongful act, or (b) to leave it to customary international law to determine the existence of such acts and the special regime attaching thereto. In Italy's view, neither of these aims is acceptable. Italy believes, as stated above, that customary international law already provides for differences in the regime of State responsibility, particularly as regards the subjects entitled to invoke it. To deny the specificity of the responsibility regime for the acts in question would be a step backward in terms of existing law and not a codification effort. Not to deny the existence of a special responsibility regime for certain particularly serious wrongful acts, but to leave it to customary law to decide that they have been committed, seems to Italy to be equally unacceptable, because it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed.

It follows from the foregoing that the special responsibility regime for wrongful acts adversely affecting the fundamental interests of the international community to which Italy is referring is not a regime of the criminal type like the one provided for in the domestic

law of States. The Commission, moreover, was always careful to state that in using the expression "international crimes" to designate wrongful acts of States entailing a special responsibility regime it never had any intention of attaching to the acts in question the types of responsibility peculiar to domestic law. The consequences currently attached to international crimes in articles 52 and 53 of the draft do not resemble the criminal penalties known to domestic law. Therefore, the use of the expression "international crimes", which has aroused so many concerns and objections on the part of a number of States, does not raise any problems for Italy, which views it solely as a concise way of referring to the most serious internationally wrongful acts (the same applies to the term "international delict", which is used to designate less serious internationally wrongful acts). Nevertheless, should the Commission deem it appropriate, in order to overcome certain objections, to use another term to designate the most serious internationally wrongful acts, Italy would have no objections.

Part Three
Settlement of disputes

Italy believes that the draft should include a part dealing with the *settlement of disputes*. A convention on the international responsibility of States must be accompanied by dispute-settlement provisions concerning the interpretation and implementation of the convention. The basic link between rules on internationally wrongful acts and their legal consequences, on the one hand, and the regime for the settlement of disputes concerning such acts, on the other hand, means that it is preferable, if not necessary, for the dispute-settlement rules not to be drawn up directly by the future conference itself, which may be called upon to adopt a convention on State responsibility. It would be particularly difficult to discuss rules on countermeasures and on international crimes and their consequences without knowing at that point what the dispute-settlement regime was to be. Italy therefore shares the view that the Commission's draft should contain a part dealing with the settlement of disputes.